No. 20783

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL,

Respondent.

BRIEF OF RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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SUBJECT INDEX

AUTHORITIES

AUTHORITIES (Cont.)

AUTHORITIES (Cont.)

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STATEMENT OF THE CASE

Respondent agrees with and accepts the Board's statement of the case, except that the statement should have contained a full quotation of Article I of the proposed Oregon State Building and Construction Trades Council Agreement, which quotation is here provided:

> "This agreement shall apply to and cover all building and construction work performed by the Employer, Developer and/or Owner-Builder within

the jurisdiction of any Union affiliated with the Council and the contracting or sub-contracting of work to be done at the site of the construction, alteration, painting, repair or demolition of a building, structure or other work." (Emphasis appears in the original contract.)

ISSUE

The position of the petitioning National Labor Relations Board (hereinafter called the "Board") has been stated many times, *e.g., Los Angeles Building & Construction Trades Council (Portofino Marina)*, 150 NLRB 152 (1965); *Los Angeles Building & Construction Trades Council (Couch Electric Company, Inc.)*, 151 NLRB 46 (1965): Contract clauses insofar as they provide that no employee need cross a picket line, violate Section 8(e) of the National Labor Relations Act, as amended, "since the clauses in their broad scope can be read as applying to unlawful secondary picketing;" and contract clauses which provide that an employee need not handle unfair goods "is but another sanction made available to the respondent to enforce the unlawful clauses of its agreements."

Section 8(e) makes it an unfair labor practice to enter into a labor contract wherein the employer agrees to refrain from using the products of or to cease doing business with another person. Generally, however, Section 8(e) exempts contracts in the construction industry from the proscriptions of Section 8(e).[1]

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[1] See the Board's opening brief at pages 6-7 for the full text of Section 8(e) and Section 8(b)(4)(A). 29 U.S.C. § 158.

Article IX of the contract in question in this case would permit employees to refuse to "cross any picket line" or to "handle any product declared unfair."[2]

The Board concedes that the above clauses would be perfectly valid if they contained, for instance, limiting adjectives or clauses: *e.g.*, "cross any *legal* picket line" or "handle any product declared unfair *provided such refusal to handle is legal.*"

But, says the Board, without such limitation they could conceivably authorize secondary activity and permit economic coercion to enforce the secondary provisions. Consequently, the Board held Article IX to be in violation of Section 8(e) and thereby held respondent's picketing to obtain such a contract to be a violation of Section 8(b)(4)(A) of the Act.[3]

If there were no Section 8(e), there would be no violation. Thus, the principal issue is simply: Does Article IX, read in conjunction with the entire proposed contract (particularly Article I), violate Section 8(e)?

This issue can be further narrowed: Does the construction industry proviso apply to the contract in question? If it does, then Section 8(e) does not apply; and if Section 8(e) does not apply, then there can be no violation of Section 8(b)(4)(A) which only prevents picketing to obtain contracts in violation of Section 8(e).

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[2] See the Board's opening brief at page 2 for the pertinent text of Article IX of the contract in question.

[3] There is no evidence of existing and identifiable sub-contractors on the picketed job site, so that there can be and is no charge of an unfair labor practice under Section 8(b)(4)(B) of the Act as was found in *Building and Construction Trades Council of Orange County* (*Sullivan Electric Co.*), 157 NLRB 25 (1966).

A collateral issue is: Is it proper for the Board to presume an illegal intent from the wording of Article IX of the contract simply because the contract does not contain language prohibitory of illegal action?

ARGUMENT

1. A History of the Board's Position Regarding Hot-Cargo Clauses.

The history of the Board's position regarding "hot-cargo" provisions[4] is interesting as well as informative in dealing with the issue in this case.

In 1949, the Board's position was that Section 8(b)(4)(A) is not violated by a hot-cargo clause in the contract, that such clauses were permissible inasmuch as the employer had acquiesced. *International Brotherhood of Teamsters* (*Conway Express*), 87 NLRB 972 (1949).

In 1954, the Board changed its position, overruled *Conway*, and held that hot-cargo clauses were a nullity and no defense to a Section 8(b)(4)(A) charge. *Inter-*

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[4] Here we use the term *hot-cargo clause* in the general sense of applying to all contract clauses which are an agreement to refrain from handling products of other employers or to cease doing business with other persons. Many of the cases wherein the Board has been previously overruled on the issue of obtaining hot-cargo clauses have involved so-called "sub-contractor clauses" wherein generally the employer agrees to either hire only union sub-contractors or to insure that all union wages, hours and conditions will be observed by his sub-contractors. In the case at bar the clauses in question are not subcontractor clauses, but this factual distinction is not apposite here. The sub-contractor clause cases are germane here, for no matter what the nature of the clause, the point is that the Board attacks it as being a violation of Section 8(e), that is, attacks it as being an agreement to refrain from handling products of other employers or to cease doing business with other persons.

national Brotherhood of Teamsters (*McAllister*), 110 NLRB 1769 (1954).

In 1955, the Board reached still another position when it held that hot-cargo clauses are permissible in contracts but that any direct attempt by the union to induce the employees to observe the hot-cargo clause violated Section 8(b)(4)(A), even if the employer consented to the inducement. *Local* 1976, *United Brotherhood of Carpenters* (*Sand Door*), 113 NLRB 1210 (1955).

In 1957, the Board went further and implied that the mere existence of a hot-cargo clause in a contract would constitute a presumption of inducement in violation of Section 8(b)(4)(A). *Truck Drivers Union* (*Genuine Parts Co.*), 119 NLRB 53 (1957).

Then, in 1958, the United States Supreme Court in *Local* 1976, *Carpenters* v. *NLRB,* 357 U.S. 93 (1958) (the celebrated "Sand Door" decision) held that the Federal Labor Statutes do not, in any way, proscribe against labor-management hot-cargo agreements, although it would be an unfair labor practice to strike or use economic coercion to enforce such a clause once it had been obtained.

Then in 1959, Congress enacted the Labor-Management Reporting and Disclosure Act which included the passage of Section 8(e). In short, Section 8(e) disallows hot-cargo clauses and makes them null and void. Section 8(b)(4)(A) was, at that time, amended also to preclude unions from striking or using economic coercion to obtain clauses prohibited by Section 8(e). But

the new Section 8(e) also contained the construction industry proviso which, in general, exempted the construction industry from the proscriptions of Section 8(e) regarding the contracting of work at the site of the construction.

Following the 1959 amendments, the Board took the position that hot-cargo clauses were permitted in the construction industry when voluntarily made, but that the union could neither *picket to obtain* them, nor *picket to enforce* them. *E.g., Laborers Union Local* 383 (*Colson & Stevens Construction Co.*), 137 NLRB 1650 (1962).

But the Federal Courts (including this Court) did not accept this interpretation of the new amendments and promptly reversed the Board in a number of instances, holding that the *Sand Door* precedent still applied and that, therefore, the construction industry proviso excludes on-site construction labor contracts from the effect of Section 8(e) and thereby from the effect of Section 8(b)(4)(A); thus it was permissible for the union to picket or to coerce to obtain hot-cargo provisions. *Laborers Union Local* 383 v. *NLRB,* 323 F.2d 422 (9th Circ. 1963) ("Colson & Stevens" decision); *Cuneo* v. *Carpenters District Council of Essex County and Vicinity,* 207 F. Supp. 932 (D.C.N.J. 1962); *LeBus* v. *Plumbers Local* 60, 193 F. Supp. 392 (E.D. La. 1961); *Essex County District Council of Carpenters* v. *NLRB,* 332 F.2d 636 (3d Circ. 1964); *Orange Belt District Council* v. *NLRB,* 328 F.2d 534 (D.C. Circ. 1964).

Following this Court's decision in *Colson & Stevens,*

the Board continued to follow its prior position and expressly and respectfully refused to follow this Court's holding. *Los Angeles Building & Construction Trades Council (Treasure Homes)*, 145 NLRB 34 (1963).

But then, in 1964, the Board reversed itself, decided to follow *Colson & Stevens* and allowed picketing to obtain *certain* on-site construction hot-cargo clauses. *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 93 (1964).

The latest position of the Board, and apparently the one exerted in the case at bar, is that so-called sub-contractor clauses (a form of hot-cargo clause) in the construction industry are legitimate under the 8(e) proviso, but certain other broadly interpreted types of hot-cargo clauses are not legitimate under the proviso. Hot-cargo clauses such as are involved in the case at bar are deemed prohibited by Section 8(e) because they attempt to allow what 8(b)(4)(B) disallows; *i.e.*, such clauses attempt to permit the union *to enforce* the hot-cargo clauses. See *Muskegon Brick Layers Union (Greater Muskegon General Contractors Association)*, 152 NLRB 38 (1965); *Southern California District Council of Hod Carriers (Swimming Pool Gunnite Contractors Group)*, 158 NLRB 28 (1966).[5]

In other words, the Board today is apparently saying that the picket line clause and the unfair goods clause in the case at bar are tantamount to an agree-

[5] Respondent commends to the Court the reading of Board Member Fanning's dissent in the *Muskegon* case.

ment to allow the union to use economic coercion *to enforce* the hot-cargo or sub-contractor clauses of the contract and are, therefore, a violation of Section 8(e) and Section 8(b)(4)(A). This is a new and unique approach to an area of construction hot-cargo clauses. It culminates a long line of varied positions by the Board and provides the latest quilt patch to what the United States Supreme Court has called a "checkered career."[6]

Respondents would urge that this latest position is nothing more than a disguised continuance of the Board's previous arguments as made in the *Sand Door* and *Colson & Stevens* cases.

2. The Legislative Policy and Spirit Underlying the Construction Industry Proviso.

Section 8(e) and its construction industry proviso were passed by the United States Congress principally to curtail certain labor management happenings in the transportation industry. The Legislature was, at all times, sympathetic with the traditional attitude of construction workers to refuse to work with and alongside of non-union products and workers.

In discussing the construction industry exemption to Section 8(e), it has been said:

> "[W]e note that the unions in the trucking industry were the prime target of congressional concern." *Teamsters, Local* 413 v. *NLRB,* 334 F.2d 539, 549, (DC Circ. 1964). *Accord, NLRB* v. *Servette, Inc.,* 377 U.S. 46, 55 (1964).

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[6] *Local* 1976, *Carpenters* v. *NLRB,* 357 U.S. 93, 101 (1958).

In *Essex County District Council of Carpenters* v. *NLRB,* 332 F.2d 636 (3d Circ. 1964), the Court states:

> "This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. The exemption does not extend to other agreements, such as those relating to subcontracts for supplies and materials to be transported to and delivered on the construction site." *Id.* at 640.

The most recent decision in this area is *Teamsters Local* 695 v. *NLRB,* — F.2d —, 53 CCH Labor Cases ¶ 11,217 (D.C. Circ. May 6, 1966). There the Court held that a picket line provision, such as in the case at bar was violative of Section 8(e) insofar as it applies to secondary activity. But here again, just as in all of the principal Court cases relied on by the Board and Intervenor in their briefs,[7] the case did not involve the construction industry proviso. It was argued by the union in *Teamsters Local* 695 that it was involved in on-site construction and that therefore the proviso should ap-

[7] The cases cited and heavily relied on by the Board and intervenor all concern the non-construction industries and all fall outside of the Section 8(e) proviso, e.g.: *L. A. Mailers Union* v. *NLRB,* 311 F.2d 121 (D.C. Circ.); *NLRB* v. *Amal. Lithographers,* 309 F.2d 31 (9th Circ.); *NLRB* v. *Joint Council of Teamsters No.* 8, 338 F.2d 23 (9th Circ.); *NLRB* v. *Teamsters Local* 294, 342 F.2d 18 (2d Circ. 1965); *Truck Drivers Local* 413 v. *NLRB,* 334 F.2d 539 (D.C. Circ. 1964). The more relevant line of case precedent would be those cases which deal with hot-cargo clauses in the construction industry, e.g., *Local* 1976, *Carpenters* v. *NLRB,* 357 U.S. 93 (1958); *Laborers Union Local* 383 v. *NLRB,* 323 F.2d 22 (9th Circ. 1963); *Essex County District Council of Carpenters* v. *N.L.R.B.,* 332 F.2d 636 (3d Circ. 1964).

ply. The Court rejected this argument inasmuch as the supposed on-site work was merely the delivery and pouring of concrete at the site. The Court went on to say:

> "The importance of this distinction [the distinction of excepting on-site construction work from Section 8(e)] is that the purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site." *Id.* at —

3. The Proviso Applies to the Facts of this Case and Thereby the Proscriptions of Section 8(e) Do Not Apply.

Section 8(e) does not apply to the contract in question inasmuch as the construction industry proviso of Section 8(e) saves and excepts on-site construction industry from the effect of Section 8(e).

There should be no doubt that the industry here involved is construction. As such, this contract comes within the exception stated in Section 8(e):

> "*Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: * * *"

There should also be no doubt that the contract in question is limited to on-site construction. Article I of the contract in question states in part:

> "This Agreement shall apply to * * * the con-

tracting or subcontracting of work to be done at the site of the construction, alteration, painting, repair or demolition of a building, structure or other work." (Emphasis appears in the original contract.)

The reader will quickly discern that the drafter of Article I has virtually copied the language of the Section 8(e) proviso, has intentionally placed it at the commencement of the contract terms, and has deliberately underscored its *on-site* application. It seems patently clear, therefore, that a reading of the *whole* agreement and not just a part thereof, would put the contract and Article IX thereof squarely within the construction industry proviso. Thus, Section 8(e) does not apply and respondent is permitted to picket to obtain this contract as written.

In *Los Angeles Building & Construction Trades Council* (*Couch Electric Co.*), 151 NLRB 46 (1965), there was a similar introductory clause such as Article I in this case. But the Board in deciding that case apparently ignored it, and the opinion reflects that the issue was never raised. Respondent believes that the issue was ignored simply because, as we understand the Board's position, it makes no difference to the Board if the contract is limited to on-site construction. In the recent case of *Los Angeles Building & Construction Trades Council* (*Fowler-Kenworthy Electric Co.*), 151 NLRB 83 (1965), General Counsel for the Board argued the same position that the Intervenor in this case now contends, that is, that the clause in question was not expressly restricted to on-site construction work and

therefore did not come within the construction industry proviso. The Board rejected this argument saying:

> "As the General Counsel sees it, the 'vice' in Article IV lies in its reference to 'all the work performed by said sub-contractor' and in its failure expressly to confine the coverage of that phrase to on-site work. It is on this basis alone that the General Counsel would read into the Article by implication a purpose to include off-site as well as on-site work within the scope of its coverage. We are not persuaded, however, that in the circumstances of this case such a construction is necessarily or even reasonably required. Other terms of the same Article reflect an intent to confine the work covered by the quoted phrase to such work only as falls within the work jurisdiction of unions affiliated with the Building and Construction Trades Councils in the geographical area. There is nothing in this record to show that the work jurisdiction of any such union includes off-site work. Nor does it appear that Alexander, a general contractor in the construction industry, ever undertakes or subcontracts work to be done off-site. The only evidence presented in this proceeding concerning work undertaken or subcontracted by Alexander relates to work that was to be performed at a construction site."

Thus, we understand the Board's position to be that even though the clauses of Article IX are effectively limited to on-site construction, they are nevertheless in violation of Section 8(e) because under a broad interpretation they could conceivably authorize secondary activity and because they could conceivably be another sanction made available to respondent to enforce secondary provisions of the contract.

4. In the Absence of the Section 8(e) Proscriptions, the Law Permits the Picketing to Obtain the Clauses in Question.

If the clauses of Article IX violate the Act, they violate it because Section 8(e), and *only* Section 8(e), proscribes against them. Indeed, this is what the Board found and ruled. Without Section 8(e), there is no other statutory proscription against such a clause. Thus, under the facts of this case. it is permissible, and not an unfair labor practice for the Respondent and the Intervenor to enter into any kind of a contract wherein the effect is to permit the non-handling of products of another employer or the cessation of business with another person.

In *District Council of Carpenters* v. *NLRB,* 332 F.2d 636 (3d Circ. 1964), the union picketed to obtain a contract containing a so-called "non-union condition" provision which permitted employees to refuse to work on any construction work at the job site where there are non-union employees. The NLRB held this to be in violation of Section 8(b)(4)(A) inasmuch as the clause violated Section 8(e). However, the Third Circuit denied enforcement of the Board's order. The Court reasoned, just as respondents argue here, that the construction industry exemption to Section 8(e) applies, therefore the proscriptions of Section 8(e) do not apply: Ergo, the union can picket to obtain such a clause.

Likewise, the United States Supreme Court in the *Sand Door* case[8] was presented with a proposed contract clause, *inter alia,* which stated that "workmen shall not

[8] *Supra* at Footnote 6.

be required to handle non-union material." The ruling of the United States Supreme Court is well known; Unions can picket to obtain such a clause. The effect of the 1959 amendments on the *Sand Door* case has only been to curtail this holding in the non-construction and non-garment industries.

Without the application of the Section 8(e) proscriptions, the U. S. Supreme Court has also held that a union and an employer could agree that employees have a right to refuse to cross a picket line. *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953).

And this Court in *Laborers Union Local* 383 v. *NLRB,* 323 F.2d 422 (9th Circ. 1963) (The *"Colson & Stevens"* case) in refusing to enforce the Board's order that a proposed contract clause violated Section 8(e), stated:

> "Picketing to secure an agreement to cease doing business with certain persons is not made unlawful by [Section 8 (b) (4) (A)] where that agreement is within the construction industry proviso of Section 8(e)." *Id.* at 426.

It has always been the undoubted right of employees to refuse to cross *primary* picket lines. This was true before the 1959 amendments; it was affirmed in the 1959 amendments[9]; and it is true now. See *Teamsters Local* 413 v. *NLRB,* 334 F.2d 539, 543-44, (DC Circ. 1964). Hence, there has always been the right of the union and the employer to so agree in their labor contracts. The passage of Section 8(e) and its construction

[9] See the proviso to 8(b)(4)(B).

industry proviso has absolutely nothing to do with the crossing of *primary* picket lines or with contracts in regard thereto. *Orange Belt District Council* v. *NLRB*, 328 F.2d 534 (DC Circ. 1964). On the contrary, Section 8(e) concerns itself only with *secondary* activities. When the construction industry proviso excepts that industry from the effect of Section 8(e), it means that contracts regarding on-site secondary activities are permitted in the construction industry. Hence, even if it could be conceivably demonstrated that Article IX in this case was intended to apply to *secondary* picket lines, it would not be an unfair labor practice until the union attempted to enforce such an agreed clause by economic pressure on the employer.

Of course, it was certainly *not* the intention of the drafters of Article IX to authorize illegal conduct and that fact may be legally presumed. On the contrary, the intent of the clause was to make clear to signatory employers that employees had the right to refuse to cross picket lines which, of course, have been legally constituted. The clause does not contemplate the illegality of a secondary picket line, nor does it contemplate the illegality of employees refusing to cross that secondary picket line, nor does it contemplate the illegality of economic coercion to enforce any activity proscribed by 8(b)(4)(B).

5. The Collateral Issue.

The Board concedes that the clauses would be proper if they had contained limiting adjectives or clauses, *e.g.*,

"cross any *legal* picket line" or "handle any product de clared unfair *provided such refusal to handle is legal.*"

Respondent is somewhat frustrated and mystified t find that an unfair labor practice has been charged an found simply on the basis of a missing limiting adjective or to find that agreements can be legal only if they ar expressly modified by the word "legal." In *NLRB* v *Mountain Pacific Chapter,* AGC, 270 F.2d 425 (9t Circ. 1959), this Court said that a provision in a labo contract requiring an employer to exclusively use th union hiring hall is not on its face illegal merely by it failure to contain language guaranteeing non-discrimin atory hiring.

> "It is apparent, then, that a contract which con tains discriminatory provisions is illegal per se. It i also patent that a contract which is fair on its fac is not unlawful in and of itself simply because i does not contain clauses prohibitory of illega action." *Id.* at 421.

The Board's attempt here to write the contract o the parties is too technical. Collective bargaining con tracts are not to be so rigidly construed. In speaking o such contracts, the United States Supreme Court ha said:

> "It is more than a contract; it is a generalized code to govern a myriad of cases which the drafts men cannot wholly anticipate. * * * 'There are to many people, too many problems, too many un foreseeable contingencies to make the words of th contract the exclusive source of rights and duties'.' *Steelworkers* v. *Warrior & Gulf Navigation Co.* 363 U.S. 574, 578-79 (1960).

Respondent submits that the rule here should be that absent any demonstrated secondary intent the contract terms should be liberally construed and interpreted as applying to legal activity.

Any other rule would call from the grave the ghost of hypertechnical drafting from a day in ancient common law when contract language meant more than the presumptions of law and when desired simplicity in drafting became prey to miles of verbage.

CONCLUSION

Respondent respectfully submits that the Board's petition for enforcement be denied.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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